IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SUIT NO.3216 OF 1986

Karniveedu Pudiyapuril Ali Koya .. Plaintiff

Versus

1. Brijesh Ranabahadur Singh
2. Ramprasad Raghvir Yadav (Ahir)
3. Gopinath Raghvir Yadav
4. Baldev Raghvir Yadav
5. Ram Bachan Dukhiram Yadav
6. Kashinath Ram Gopal Yadav
7. Keshav Sahdev Yadav
8. M/s. Omex Builders and Contractors
9. M/s. Sohanlal & Sons
10. Vasant Purshottam Chanapatha ..Defendants

Mr. M.K. Nesari for the Plaintiff
Mr. Y.S. Bhate for Defendant No.8
Mr. Yashodhan Sakhare for Defendant No.9

CORAM : S.R. SATHE,J.
DATED : 04/04/2007

ORAL JUDGEMENT :-

1. The Plaintiff has filed this suit for declaration and specific performance of an agreement to sale.

2. The Plaintiff's case in brief is that land bearing Survey No.40, Hissa No.11, CTS No.49 admeasuring 1593.45 sq.mts. situate at Vileparle, Taluka : Andheri was owned by defendant Nos.2 to 7. They agreed to sale the suit property to defendant No.1 by executing an agreement dated 27/12/1972. Subsequently, the defendant No.1 discovered that the defendant No.2 had mortgaged the property in favour of Central Bank of India and the said bank had threatened to sale the suit property in exercise of its rights as mortgagees. The defendant No.1, therefore, decided to transfer to the Plaintiff his right, title and interest in the suit property and the benefit of the agreement dated 27/12/1972. Pending the execution of such agreement, plaintiff's advocate forwarded cheque of Rs. 50,000/- to the first defendant with covering letter stating therein that advocate of the first defendant should hold the said amount in trust. The first defendant, thereafter redeemed the said mortgage. The defendant Nos. 2 to 7 were aware that the mortgage was redeemed in pursuance of the agreement dated 18/07/1974 between Plaintiff and defendant No.1. The defendant Nos. 2 to 7, thereafter, deposited the title deeds with Plaintiff's advocate. As per the agreement dated 18/07/1974, the defendant No.1 was to complete the sale

with Plaintiff within 12 months. In fact, as per the initial agreement between the defendant No.1 and defendant Nos. 2 to 7, the Sale Deed in favour of defendant No.1 was to be executed within 12 months. However, the said time period was further extended for period of 3 years from 24/12/1976. The letter to that effect was also signed by defendant Nos. 1 to 7.

3. The Plaintiff, thereafter, came to know that with a view to give go by to the agreement of Plaintiff and defendant No.1, the defendant Nos. 2 to 7 entered into an agreement dated 03/04/1979 with Vasant Purshottam Chanapatha i.e. defendant No.10. The Plaintiff and defendant No.1, therefore, objected for the said transaction. Thereafter as per the request letter dated 03/05/1979 written by the advocate of defendant No.10, the Plaintiff sent the title deeds to him. The Plaintiff also informed the defendant No.10 about the Plaintiff's right, title and interest in the property. Thereafter, meetings took place between the defendant No.1 to 7 and 10. In 1980, the defendant No.1 informed the Plaintiff that he has filed a suit No.150 of 1980 for the specific performance of the agreement executed in his favour by defendant Nos. 2 to 7. The defendant Nos. 2 to 7, thereafter, informed Plaintiff

that the suit property was protected by virtue of order passed in Notice of Motion taken in that suit.

4. In the year 1986, the Plaintiff found one notice board on the suit plot, showing that defendant No.9 has started construction on the suit plot. Naturally, the Plaintiff made inquiries and he came to know that defendant No.1 and 2 to 7 and 10 have settled the suit inter-se and consent decree was passed whereby they agreed to convey their right, title and interest in favour of OMEX Builders, defendant No.8 fraudulently defeating the Plaintiff's rights.

5. The Plaintiff, therefore, issued letter dated 24/04/1986 to defendant No.1,8 and 9 and called upon them to convey their rights in favour of Plaintiff. According to Plaintiff then defendant No.9 called upon Plaintiff to give inspection of the documents. He gave the same. It is Plaintiff's case that the defendant No.1 was bound and liable to nominate the Plaintiff as the purchaser in view of the agreement dated 18/07/1974. The Plaintiff also alleged that Plaintiff's agreement is prior in time to the agreement executed in favour of defendant No.10. The Plaintiff, therefore, filed the present suit for declaration that the consent

decree dated 02/12/1983 passed in Suit No.150/1980 is null and void and not binding on the Plaintiff to the extent of his rights. The Plaintiff also prayed for specific performance of the agreement dated 18/07/1974.

6. From the perusal of the record it appears that during the pendency of the suit, the Plaintiff filed Notice of Motion No. 2686/1986 seeking interim relief restraining the defendants from dealing with property or creating any third party interest. The said Notice of Motion was strongly opposed by the defendant No.1 and defendant Nos.8 to 10. The defendant No.1 contended that he is a bonafide purchaser for value without notice. The defendant No.8 had acquired title to the suit property by consent decree. When Plaintiff had published notice of his claim in the newspaper on 21/04/1986, the defendant No.9 had sought inspection of the agreement executed in favour of Plaintiff by defendant No.1. However, the said inspection was not given by the Plaintiff. The defendant also contended in the said Notice of Motion that the transaction between Plaintiff and defendant No.1 was money lending transaction. They also contended that the suit filed by the Plaintiff is not in time.

7. After considering the documents and affidavits filed by the respective parties and hearing arguments of the concerned Advocates, this Court (CORAM : G.H. GUTTAL, J.) passed order on 29/09/87 and held that defendant No.9 is bonafide purchaser for value without notice and Plaintiff's suit is time barred. Naturally, he dismissed Notice of Motion. Admittedly, the said order has obtained finality.

8. Though, the defendants had opposed the Notice of Motion taken out by the Plaintiff, curiously enough, they did not file Written Statement and the suit proceeded without Written Statement.

9. From the perusal of the record, it appears that the Plaintiff was directed to file affidavit of evidence and documents and then, this Court (CORAM : D.G. KARNIK, J.) allowed the defendants to cross-examine the Plaintiff Karniveedu Pudiyapuril Ali Koya. He was cross-examined only on behalf of defendant No.9.

10. The following points arise for determination in this Suit. I have given my findings as mentioned against the same.

ISSUES	FINDINGS
1. Whether the suit filed by the Plaintiff is barred by law of limitation ?	**YES**
2. Does the Plaintiff prove that the transaction between him and defendant No.1 for which agreement dated 18/07/1974 executed was in respect of the sale of property as alleged ?	**NO**
3. Whether the Plaintiff is entitled for declaration that the decree passed in suit No.150/80 is null and void ?	**NO**
4. What order ?	**As stated below in final order.**

11. In order to prove the suit claim, the Plaintiff has filed his affidavit of evidence. However, it must be noted that he has not even produced the original agreement dated 18/07/1974. In fact, though he has referred in his affidavit several documents, he has not at all produced even a single original document. Not only that but he has not even produced xerox copies of those documents but has only produced cyclostyle copies

of the original documents. He has stated that the said documents were cyclostyled for including the same in the paper book of appeal filed by him which he had preferred against the order passed against him in Notice of Motion. Thus, we find that the Plaintiff has in fact, produced secondary evidence. It is needless to say that as per the provisions of Section 64 of the Indian Evidence Act, documents must be proved by the primary evidence. Of course, if primary evidence is not available party can give secondary evidence. Though Shri Yashodhan Sakhare, learned Advocate for the defendant No.9 tried to argue that the Plaintiff has not produced any original documents, it must be noted that in cross-examination it is not even suggested to Plaintiff that what he has stated regarding loss of original documents is not true. In fact, though Plaintiff had specifically stated that original documents have been lost and the present documents are cyclostyled copies which were prepared at the time of filing paper book in the appeal against the order passed in Notice of Motion that is also not challenged. So, under such peculiar circumstances, I am inclined to consider the above mentioned secondary evidence. We can not ignore the fact that the rule in Section 65 of the Evidence Act excluding secondary evidence is not so

rigid as to be enforced, even if, no objection has been taken at the trial by the parties against whom the secondary evidence has been offered. When the party has waived proof of circumstances justifying giving of secondary evidence and the secondary evidence is allowed, he can not raise objection to its admissibility afterwards. In the instant case, admittedly, no evidence is adduced by the defendants. So, on the basis of Plaintiff's evidence, let us try to find out as to whether the Plaintiff has proved the suit claim.

12. From the Plaintiff's evidence, it is clear that the defendant No.1 has executed an agreement dated 18/07/1974 in favour of Plaintiff. Though Plaintiff has tried to suggest that this is an agreement to sale the suit property, if we carefully consider the recitals in the said agreement as well as subsequent correspondence between the parties, it does appear that the real transaction between Plaintiff and defendant No.1 was in fact not in respect of sale of the suit property. It was a money lending transaction. It seems that as defendant No.1 wanted to redeem the mortgage, he wanted to raise funds and for that purpose, the Plaintiff had advanced Rs. 50,000/- to the defendant No.1. Even

according to the Plaintiff's say the defendant No.1 had deposited the title deed with Plaintiff's advocate with a view to create an equitable mortgage in favour of Plaintiff for the payment of Rs. 50,000/- made by him. So, this itself shows that the transaction between Plaintiff and defendant No.1 entered into by a document dated 18/07/1974, there was no intention of the defendant No.1 to sale the suit property to Plaintiff. Besides this, in the letter dated 18/07/1974 written by defendant No.1 to Plaintiff's advocate, defendant No.1 had asked the Plaintiff to retain the said agreement as agreed between the parties. So, this also shows that the intention was only to keep the document by way of security. So, when the real transaction under the document in question is not in connection with the sale but it is a money transaction between the parties, no decree for specific performance can be passed in favour of the Plaintiff on the basis of such document. Hence, I have answered the issue No.2 in the negative.

13. The learned Advocate for the Plaintiff tried to argue before me that the defendant Nos.2 to 10 were in fact aware of the agreement executed by defendant No.1 in favour of Plaintiff. So, the subsequent agreement executed between them is not legal and valid as they

were aware about the Plaintiff's right in respect of the suit property. While considering this question, it must be held that the transaction between Plaintiff and defendant No.1 was in fact not in respect of sale, so the subsequent transaction with regard to sale between defendants inter-se has no effect on the Plaintiff's alleged agreement to sale. Incidently, it must be noted that when the agreement dated 18/07/1974 was executed in favour of Plaintiff by defendant No.1, the defendant No.1 had in fact, no title to the suit property and consequently, he was not in a position to create any right in respect of such property in favour of Plaintiff. Besides this, as the transaction was of advancing amount of Rs. 50,000/-, it also can not be said that Plaintiff had in fact received any right to purchase the property under the agreement.

14. Though, the Plaintiff has now tried to show that the defendants entered into various transactions inter-se by keeping him in dark, it is not so. On the contrary, from Plaintiff's own evidence, it is very clear that the Plaintiff had full knowledge about the transaction entered into between defendant Nos.1 and 10. Not only that but right from the beginning the Plaintiff was aware about the suit filed by defendant

No.1 against defendant Nos.2 to 10. If really the transaction between defendant No.1 and Plaintiff was in respect of the sale of suit property then certainly plaintiff should have moved the Court for impleading him as party defendant in the suit No.150/1980. But admittedly, he did not do so. No explanation is given for such inaction on the part of defendant. So, this very conduct of Plaintiff is eloquent to show that the defendant No.1 had in fact not agreed to sale suit land to Plaintiff and that is why the Plaintiff kept mum. So, under such circumstances, now it is in fact not open to Plaintiff to contend that the consent decree passed in the above mentioned suit is null and void.

15. From the Plaintiff's own evidence it is very clear that the defendant No.9 is developer and when Plaintiff had issued notice, the defendant No.9 had in fact called upon to Plaintiff to give inspection of the documents. During the Notice of Motion, the defendant No.9 had filed affidavit to that effect and it was not controverted by the Plaintiff and as such while dismissing the said Notice of Motion, the learned Judge of this Court observed that the defendant No.9 had taken due precaution to find out whether there is any encumbrance on the suit property or whether any one

else was having any right in the suit property. Thus from the evidence on record it does appear that defendant No.9 is a bonafide purchaser for value without notice. So, considering all these aspects also it can not be said that the decree passed in 150/1980 is void. Hence, I have answered issue No.3 in the negative.

16. The learned Advocate for defendant No.9 submitted that admittedly at present the suit property is owned and possessed by the Co-operative Housing Society and the said society is not made party in this suit. So the suit suffers from non-joinder of necessary party. There is substance in this argument.

17. It is an admitted fact that when the defendant No.1 has executed alleged agreement to sale in favour of Plaintiff the period for executing the sale deed was mentioned as 12 months. According to Plaintiff, it was extended thereafter for 3 years from 24/12/1976. Even if it is so, that period expired on 24/12/1979. The present suit is filed on 13/11/1986. So, the same is not in time. The Plaintiff himself has stated in his pleadings (Para-n on page-14) that by letter dated 11/02/1980 the defendant No.1 had even contended that

no agreement has been executed in favour of Plaintiff. So, it must be held that by virtue of such letter, defendant had in fact, refused to perform the alleged agreement dated 18/07/1974. So, the period of limitation of 3 years started from such refusal as per the provision of Article-54 of the Limitation Act. So, the suit filed in the year 1986 can not be said to be in time. Hence I have answered issue No.1 in the affirmative.

18. In view of above, I have no hesitation to hold that Plaintiff has failed to prove the suit claim. Hence, I pass following order :-

O R D E R

The suit is dismissed with costs.

(S.R. SATHE,J.)